Fairhaven Properties, Inc., Myron Nelkin d/b/a Central Management Co., Fairhaven Apartments #1, Inc., Fairhaven Apartments #2, Inc., Fairhaven Apartments #3, Inc., Fairhaven Apartments #4, Inc., Fairhaven Apartments #5, Inc., Fairhaven Apartments #6, Inc., Fairhaven Apartments Syosset, Inc., and Fairhaven Maintenance and Construction, Inc. ***and*** **Local 32B-32J, Service Employees International Union, AFL–CIO.** Cases 29–CA–16346, 29–CA–16382, 29–CA–16555, and 29–CA–16808

August 17, 1994

DECISION AND ORDER

BY MEMBERS STEPHENS, DEVANEY, AND BROWNING

On April 26, 1993, Administrative Law Judge Raymond P. Green issued the attached decision. The Respondent and the General Counsel each filed exceptions and a supporting brief, and the Respondent filed an answering brief to the General Counsel's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The National Labor Relations Board has considered the decision and record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions only to the extent consistent with this Decision and Order.

After a full review of the facts and the relevant law, we have, in summary, made the following decisions. We find that the named Respondents are a single employer, not a joint employer as found by the judge. We adopt the judge's finding that the Respondent's solicitation of employees to abandon the Union was an unlawful interrogation, but find that it also constituted an unlawful inducement to abandon the Union and an unlawful attempt to bypass the Union. We find that the strike was an unfair labor practice strike from its inception. We adopt the judge's finding that the Respondent unilaterally ceased making benefit funds contributions. We modify the judge's finding that the Respondent unlawfully refused to furnish the Union with financial information. We adopt the judge's finding that the Respondent unlawfully delayed furnishing the Union with the names and addresses of replacements. We adopt, with additional reasoning, the judge's finding that the Respondent threatened picketing employees with physical harm. Finally, we reverse the judge and find that the Respondent engaged in surface bargaining, reverse the judge's finding that the parties were at impasse, and enter an appropriate remedy and Order.

The facts are largely undisputed and are for the most part fully set forth in the judge's decision; what is disputed are the conclusions to be drawn from the facts. Because we are, however, substantially modifying the judge's conclusions, we shall restate the facts to make clear the factual basis for our decision. Additional details are provided in our discussion of the separate complaint allegations.

I. BACKGROUND FACTS

A. *Single Employer*

The complaint alleges, the answer admits, and we find that the Companies named in the case caption are a single employer.[2] The parties do not dispute unit scope or composition; we find that the appropriate and recognized collective-bargaining unit comprises all service employees (including superintendents, assistant superintendents, handymen, and porters) employed by the Respondent at the seven named apartment complexes.

B. *Past Practice*

The normal practice for negotiating new bargaining agreements has been for the Service Employees International Union to reach a pattern agreement with an association of New York City apartment owners. The Union then formulated a proposed pattern agreement for Long Island apartment owners based on the New York City agreement but with somewhat lower wages and benefits. During the latest negotiations, a New York City pattern agreement had been reached sometime in 1991, and the Union sent the proposed pattern Long Island contract to the Respondent. Although the Respondent in the past had signed the proffered Long Island pattern agreement,[3] this time, after several months of no definite response, the Respondent requested individual bargaining.

C. *First Session*

The parties first met on January 19, 1992.[4] Attorney Ira Sturm was chief spokesman for the Union; also present were union and employee representatives. Vice President Robert Lippolis was chief spokesman for the

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] The judge, at sec. II, par. 1, incorrectly found that the named Companies are a joint employer. See, e.g., *NLRB v. Browning-Ferris Industries of Pennsylvania*, 691 F.2d 1117 (3d Cir. 1982), in which the court extensively discussed the difference between single and joint employers.

[3] For unexplained reasons, Respondent signed five copies of the agreement that expired on June 21, 1991.

[4] All subsequent events occurred in 1992.

Respondent at this and the next two sessions; also present was Henry Nelkin, another official of the Respondent. Although, beginning during the fourth session, Attorney Neil Frank became the Respondent's chief spokesman, Lippolis and Nelkin were present for most, if not all, bargaining sessions.[5]

During the first session, the Respondent made five major proposals: a 1-year wage freeze, the right to subcontract, reduction by half of the number of free apartments given superintendents and assistant superintendents, the right to reduce staffing from the current level of 27 or 28 to 24, and no retroactivity. The Union took the position that the Respondent should sign the pattern agreement.

D. *February 6 Events*

On February 6, between the first and second bargaining sessions,[6] Supervisor Anton Vuklevic asked groups of employees in at least two of the Respondent's locations to sign a paper stating they wanted to get rid of the Union. Vuklevic told employees that, if they got rid of the Union, their wages and benefits, except for the pension plan, would remain the same. The employees refused. The judge correctly found that the Respondent did not put on any witnesses to rebut this testimony. The judge, however, failed to find that Henry Nelkin was present for management at each of these employee meetings and that the witnesses identified 15 employees (over 50 percent of the unit) by name as being present.

E. *Second Session*

The second session was held on February 10. The Respondent reiterated its five points. The judge credited testimony that Lippolis said the Respondent was losing money and could not afford to pay what they were paying. Sturm, for the Union, asked for the Respondent's financial records. The parties also discussed reduction in staffing. Lippolis said that the Respondent wanted a reduction to 24 employees from the current staff of 27 or 28. Sturm stated that all the employees were busy and asked if the Respondent was going to contract out to compensate for reduced staff. Lippolis said that the Respondent did not intend to contract out any bargaining unit work. He, however, would not agree to a no-subcontracting provision.

F. *Third Session*

At the third session, held February 20, the parties reiterated their positions. Lippolis stated that the Respondent wanted to reduce the staff to 24 employees. He also proposed the elimination of major renovation and construction work. Sturm said the Union probably would have no problem with that because it was not traditional bargaining unit work. Lippolis additionally stated that the Respondent might be willing to sign the pattern agreement if the concessions the Respondent sought were put into a rider. Also, the Union notified the Respondent of the possibility of a strike. At this session, Sturm demanded that the Respondent allow the Union to examine its financial records, including the receipts and expense journals for the past 6 months. February 24, the following Monday, was set as a deadline for the Respondent to answer the demand. The Respondent at no time furnished the Union with its books or other specific financial information.

G. *The Strike*

On February 25, the Union called a strike. The unit employees at the Hicksville complex were not asked to strike and continued to work. The Union claimed the strike was an unfair labor practice strike based on the Respondent's February 6 meetings with employees. According to the uncontradicted testimony of James Edwards, a union business agent, he went to each apartment location prior to the strike and spoke to unit employees as a group. He informed them of what had happened in negotiations and explained that, because the Employer had gone around with the February 6 paper to oust the Union, if the Union called a strike, it would be due to the Employer's attempt to break the Union. He further explained that in an unfair labor practice strike employees could return to work, but if it were a normal, economic strike, their jobs would not be as protected.[7]

Employee witnesses corroborated Edwards' testimony that they were aware before striking of the Respondent's February 6 conduct. Louis Quintana testified on cross-examination that he went on strike because of the unfair labor practice, problems in contract negotiations, and the Union informed him the Employer was not bargaining in good faith. Although he was not present the day the strike was explained, Michael Walbeck testified that fellow employees told him that the reason for the strike was the Employer's letter to sign the Union away. In addition, Pedro Correa testified that one of the reasons he went on strike was because of the Employer's note that employees did not want any further Union.

[5] Our findings regarding the contract negotiations rely, as does the judge, primarily on Sturm's extensive and detailed testimony. Sturm's and Frank's testimony do not differ in material respects, and the judge credited Sturm's testimony where it conflicted with Lippolis'.

[6] In sec. II, par. 7, of his decision, the judge incorrectly stated that these events occurred before negotiations started. That paragraph also incorrectly stated that the events occurred in 1991, rather than 1992.

[7] On February 13, the Union filed an unfair labor practice charge regarding the February 6 incident.

Also, Edwards testified that throughout the course of the strike the Union used only its ''unfair'' picket signs, not its ''on strike'' signs. Similarly, leaflets handed out by the strikers stated the Employer ''unlawfully intimidated our members in an attempt to have them disavow their Union.''

H. *Fourth Session*

On February 21, the Respondent retained Neil Frank to conduct its negotiations. Frank telephoned Sturm and arranged a bargaining session for February 27. At that meeting Frank presented a list containing 43 numbered proposals. The union representatives briefly examined the list and left within 5 minutes.

Of the 43 proposals, 8 related to or expanded on the 5 proposals the Respondent made during the first 3 bargaining sessions, 2 rejected new provisions sought by the Union, 10 rejected provisions the Union sought to carry over from the prior agreement, and 15 would reduce or eliminate established or proposed wage and hour benefits. Of the remaining items, two involved contract provisions that the Respondent stated were inapplicable and one that the Respondent did not understand, one proposed changing the arbitration proceedings, one stated second and third year wages were open, and one agreed to revised contributions to the health and welfare fund. The remaining two items are of special relevance to this proceeding. Item 1 on the list stated:

> The Company does *not claim* inability to pay. It makes these proposals in view of the recession, the affect [sic] on its ability to rent apartments to make a fair profit, and the availability of people willing [sic] to work at current wages. [Original emphasis.]

Item 4 stated:

> Company will not checkoff dues or contribute to Welfare Fund, Pension Fund, Education Fund, Pre-Paid Legal plan or Annuity Fund until a contract is agreed to.

Among the proposals, the Respondent sought to eliminate the following: restrictions on subcontracting, the employees' limited right to strike if unit work is performed by nonunit personnel, daily overtime, employees' entitlement to 2 days off per week, the requirement that hours shall not be reduced, and the provision that the employer shall strive to provide 16 hours off between shifts.

I. *Cessation of Funds Payments*

In accord with item 4 on the list of 43 proposals, the Respondent, on February 27, ceased making payments to the welfare, pension, and annuity funds for all employees, including the five Hicksville employees who never went on strike.[8] The Respondent also failed to make the fund payments for those employees who subsequently abandoned the strike and returned to work. The Respondent's chief negotiator, Frank, admitted that it did so to pressure the Union by starving the funds.[9] In May, the Respondent restored, retroactively, payments to the welfare (health) fund for those, and only those, employees who never struck; returning strikers were put on the Respondent's own health plan.

J. *Fifth Session*

After some intermediate correspondence, the parties next met on April 15.[10] Sturm, the Union's chief spokesman, asked why the Respondent continued to insist on a wage freeze when it no longer claimed inability to pay. Frank responded that the rent rolls were down. Frank said that it was not that the Respondent could not afford a raise, but that it just did not want to pay it. Frank testified that he said, ''[I]f we put an ad in the paper, we would have 500 people lined up out at any of these projects looking for those jobs. And those people are getting paid, they would work for a hell of a lot less. And they would work for a hell of a lot less benefits. So why should we pay much more than what I believe and the Company believes is the market rate.''[11]

At that meeting Sturm asked for a list of the names and addresses of the replacement employees. Frank refused. Sturm requested information about the substitute health plan, which the Respondent furnished in due course. Frank stated that retroactivity applied to the entire contract, not just to wages as Sturm had believed. They also briefly discussed checkoff.

Frank stated that the Respondent wanted to reduce the employee complement to 18 rather than the previous request for a reduction to 24. Frank rejected Sturm's suggestion that the staff reduction be done through attrition. In response to Sturm's question, Frank said that none of the bargaining unit work would be contracted out. Nelkin, however, shook his head. After Frank and Nelkin conferred, they told Sturm they wanted to preserve the option to subcontract unit work. Sturm complained that the proposal to eliminate all restrictions on subcontracting differed from the discussions at earlier meetings, which had limited subcontracting to construction work and in the context of a fixed number of unit employees. The parties then

[8] Because contributions to the education fund and the prepaid legal plan had been suspended for all employers, the Respondent had at that time no obligation to contribute to those funds.

[9] In its brief in support of exceptions, the Respondent states that it withheld contributions to the funds ''as a bargaining tactic.''

[10] The record shows that the meeting was held on April 15, not April 14 as found by the judge.

[11] Frank's April 21 letter to Sturm reiterated this position, but in more diplomatic terms.

turned to discussing the contracting out of construction work.

Sturm next asked Frank to go through the list of 43 proposals to state what the Respondent really wanted. After Frank had stated a number of items, Sturm interrupted to ask what the Respondent really wanted. Frank said that they wanted to know if the Union was willing to modify the pattern agreement. Sturm replied that the Union had started with modest proposals and that he wanted to hear what the Respondent wanted before he made concessions. Frank continued but did not finish listing the items the Respondent wanted.[12]

K. *Sixth Session*

At the next session, held on May 5, the Respondent stated it would restore welfare fund payments for those employees who never struck.[13] The parties briefly discussed profits. Frank stated that, although the Respondent was operating at a profit, it was lower than the previous year. Frank refused to disclose the numbers. Frank, while holding up some papers, said he had some new proposals but that he was not going to submit them until the Union made a counterproposal. Sturm replied that he had started negotiations in good faith, that there had been a few serious but solvable problems on the table, that the Respondent had added numerous other items, and that, if Frank had a new proposal, he should put it on the table to see if they could make some progress. Frank replied that he was not going to present his proposal unless the Union modified its position. Sturm replied that he could do the same thing—come in with a two-inch thick set of proposals—but he had not. He said he came in with minimal proposals and that he wanted to discuss the real issues, the four or five original proposals. Sturm said that to present proposals in this posture would require him to bargain against himself. The session closed with discussions about welfare fund payments; Frank agreed that the Respondent would pay at the current rates.

L. *Withdrawal of Some Proposals*

By letter dated May 29, the Respondent withdrew its proposals to eliminate its responsibility for unpaid dues; to amend the no strike clause; to delete the requirement that the Respondent pay the wages of the grievant and one witness at arbitration; to eliminate the Employer's duty to strive to provide 16 hours off between shifts; to pay straight time, rather than time and a half, for holiday work; and to eliminate time off to vote. By letter dated July 23, the Respondent additionally withdrew proposals to eliminate the employee's birthday as a holiday; to eliminate the provision requiring vacancies to be listed with the state employment bureau; and to eliminate the agreement to negotiate over any provision changed by government decree.[14]

M. *Alleged threat to Strikers*

The judge credited evidence that on July 18 Henry Nelkin recklessly drove a pickup truck over a curb, passing closely to where Pedro Correa was picketing. The judge, however, failed to describe the testimony supporting this finding.

Pedro Correa testified that, when he was picketing at the Woodbury apartments on July 18, he heard a sudden noise about 11:45 a.m., saw Nelkin in a pickup truck on the grass and the sidewalk, and had to move his chair to avoid being hit. Michael Walbeck, another striker, testified that on July 18 Nelkin jumped the curb with his white Toyota pickup almost hitting the picketing employees and causing Correa to jump or fall back.

Instead of producing Nelkin, the Respondent called Lippolis who testified that he took a white Toyota pickup that Nelkin usually drives to a repair shop on July 18 at 8:30 a.m. and that the repair statement indicated the truck was picked up the following Monday, July 20. He also testified that he and Nelkin toured properties the rest of the day in his black Pathfinder. The Respondent also called John Chementi, a superintendent at Woodbury apartments. Chementi testified that Nelkin could not have jumped the curb without causing property damage and that he received no reports of and observed no property damage on July 18.

N. *Seventh Session*

After Sturm had a conversation with Frank in which Frank stated that he was serious about resolving their problems, the parties agreed to meet on August 11. They began that session by discussing staffing at length. Frank said that at that time they had 18 rank-and-file employees (but later said it might be as high as 21) and that was the staffing they wanted. Sturm said that the Respondent had had 27 employees and that they had been kept busy. Frank admitted there had been work for everybody. Frank said they had seven replacements and, if they resolved the problem, the Respondent would be willing to take back seven of the strikers. This would have resulted in three strikers not being immediately reinstated. At that point, Sturm offered to reduce the staffing to 21, so all the strikers could be reinstated, and said he would be willing to go to the Union for permission for such a reduction.[15] Frank said that he wanted only 18 employees.

[12] Also, after Sturm's explanation, Frank dropped the item from the list that the Respondent did not understand.

[13] Frank testified without contradiction that the Respondent's payments were retroactive.

[14] This was one of the items in the list that the Respondent claimed was inapplicable.

[15] The ground rules for the negotiations required approval by the Union's president.

The parties also discussed subcontracting of construction work. Sturm said that the only way he could get it approved by the Union and achieve the same result was to change the recognition clause to exclude this type of work. Frank rejected this in favor of changing the no-subcontracting clause. The parties also briefly discussed taking away free apartments for assistant superintendents. Sturm expressed concern about assistant superintendents being on call. Frank said that only the superintendents would be responsible for these emergency calls. The meeting closed because Frank had to be elsewhere.

O. *Final Session*

The final session was held on August 20. Sturm opened the meeting by asking for the names of the subcontractors performing construction and renovation work and the rates they paid. Sturm took the position that the work remained bargaining unit work, which entitled the Union to the information. Frank replied that he would take it up with his client.

After a break, Sturm asked Frank to tell him exactly what was important to the Respondent. Frank replied as follows: the wage freeze; subcontracting; no checkoff or fund contributions, except welfare; no retroactivity; contract to be dated when signed; substitute the American Arbitration Association or the Federal Mediation and Conciliation Service for the office of contract arbitration; amend the subcontracting clause to permit major repair work; eliminate the cost of living adjustment; eliminate the increase in the meal allowance; rejection of Union's language on paternity leave; no free apartments for assistant superintendents; rejection of the establishment of a committee to study self-insuring disability and unemployment; eliminate the perfect attendance bonus; no increase in contributions to the legal and training funds; objection to wages for the super rider (special wage premiums for and other provisions for superintendents); and negotiation of the second and third year wages.

Sturm asked Frank what the problem was with paternity-maternity leave as it was a no-cost item. Frank replied it was a new benefit and he did not want to give it. Frank testified that he said, ''We don't want to give you anything new, I mean that it is not my purpose of being here to give you more, my purpose is to give you less.'' After a lengthy caucus by the union representatives, Sturm told Frank the Respondent was just wasting their time. The union representatives then left.

By letter dated September 30, the Respondent belatedly furnished the names and addresses of the replacement employees and withdrew most of its proposal on the sale or transfer of buildings and its proposed elimination of the maintenance of wage differentials.[16]

II. DISCUSSION

A. *Alleged Solicitation to Abandon the Union*

We agree with the judge that the Respondent coercively interrogated employees in violation of Section 8(a)(1) of the Act when its supervisors on several occasions on February 6 solicited employees to sign a petition to oust the Union. The Respondent has not excepted to this finding. We additionally find that the supervisors' activities constituted an unlawful solicitation of employees to abandon the Union, a classic violation of Section 8(a)(1) of the Act. See, e.g., *Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678, 686 (1944).

Contrary to the judge, however, we find that the Respondent, through its supervisors' activities, also violated Section 8(a)(5) and (1) of the Act by bypassing the Union in an attempt to seek to deal directly with the employees. Between the first and second bargaining sessions, the Respondent's supervisors, in soliciting employees to abandon the Union, offered the employees a continuation of the existing terms and conditions of employment, except for pension benefits. In contrast, during the first bargaining session, the Respondent made different proposals to the Union, including a wage freeze and a reduction in staff.

Contrary to the judge's statement in footnote 6 of his decision, we find that the holding in *Schmidt-Tiago Construction Co.*, 286 NLRB 342, 364 (1987), is on point. It is well settled that the Act requires an employer to meet and bargain exclusively with the bargaining representative of its employees, and that an employer who bypasses the bargaining representative to make offers regarding the terms and conditions of employment directly to employees violates Section 8(a)(5) and (1) of the Act. *Medo Photo Supply Corp. v. NLRB*, supra at 683–684; *Allied-Signal, Inc.*, 307 NLRB 752 (1992). It is not necessary that the employer actually bargain with the employees. The question turns on whether the employer's direct solicitation of employee sentiment over working conditions is likely to erode the union's position as exclusive representative. *Modern Merchandising*, 284 NLRB 1377, 1379 (1987). Here the Respondent made an offer directly to employees about working terms conditioned on the employees' abandonment of the Union. Clearly, such an attempt to deal with the employees was intended to undermine the Union as the employees' exclusive bargaining representative. Accordingly, we find that the Respondent unlawfully sought to bypass the Union in violation of Section 8(a)(5) and (1) of the Act.

[16] This was the other item that the Respondent had claimed was inapplicable. (See fn. 14.)

B. *Alleged Unfair Labor Practice Strike*

We disagree with the judge's finding that it is unnecessary to decide whether the strike is an unfair labor practice strike or an economic strike.[17] Although the judge recognized that employee witnesses uniformly testified that they decided to strike in protest of the Respondent's February 6 unfair labor practices (sec. A, above), the judge stated that this could be a pretext seized on to ''convert'' an economic strike to an unfair labor practice strike. The judge also relied on the Respondent's statements that the workers hired to replace the strikers were only temporary replacements and that strikers would be reinstated on request.

Contrary to the judge, we find it necessary to decide whether the strike is an economic or unfair labor practice strike because under Board precedent unfair labor practice strikers are entitled to special remedial provisions, even if there is no allegation regarding denial of reinstatement. *Lucky 7 Limousine*, 312 NLRB 770 (1993); *Beaird Industries*, 311 NLRB 768 (1993). Moreover, the Respondent's statement that the replacements it has hired are temporary replacements would not itself preclude the Respondent from subsequently hiring those or other workers as permanent replacements.

The judge's use of the term ''convert'' suggests that the judge has mistakenly applied the standard for determining whether an economic strike has converted to an unfair labor practice strike rather than the standard for determining whether a strike has been an unfair labor practice strike from its inception. An economic strike will be found to have converted to an unfair labor practice strike if it has been shown that the employer's unfair labor practices have prolonged the strike. *C-Line Express*, 292 NLRB 638 (1989). In contrast, a strike will be found to be an unfair labor practice strike from its inception if the employer's unlawful conduct has played a part in the decision to strike. *C & E Stores*, 221 NLRB 1321, 1322 (1976); *Larand Leisurelies, Inc*., 213 NLRB 197, 198 (1974). A strike may be an unfair labor practice strike even though it also has economic objectives. *NLRB v. Fitzgerald Mills Corp*., 313 F.2d 260, 269 (2d Cir. 1963), cert. denied 375 U.S. 834 (1963).

In this case it is evident that the Respondent's February 6 unfair labor practices played a part in the employees' decision to strike. Throughout that month the Union's business agent, James Edwards, kept all unit employees informed of the negotiations. When he spoke to the employees prior to the strike, he explained that, if there was a strike, it would be for the Respondent's attempt to break the Union on February 6. He also explained to the employees that, in an unfair labor practice strike, their jobs would be protected, and they would have the option of returning to work, but that, if it were an economic strike, they would not have the same protections. Employees confirmed they were aware of the February 6 unfair labor practices prior to striking. Furthermore, the strikers' picket signs and leaflets were consistent with an unfair labor practice strike.

For the foregoing reasons, we find that the employees went on strike in part because of the Respondent's unlawful conduct on February 6 and that the strike was an unfair labor practice strike from its inception. Accordingly, we shall enter an appropriate remedial order to protect the strikers' prospective reinstatement rights.

C. *Alleged Unilateral Changes*

At the outset of the fourth bargaining session the Respondent submitted its list of 43 proposals. The fourth proposal stated that the Respondent would not contribute to any benefit funds until a contract was signed. In accord with that announcement, the Respondent ceased contributions to the funds for all employees, including those who never struck and those who later returned from the strike.[18]

The judge found that the Respondent unilaterally ceased to make contributions to the welfare, pension, and annuity funds on behalf of those employees who returned from the strike, and unilaterally ceased to make contributions to the pension and annuity funds on behalf of those employees who never struck, in violation of Section 8(a)(5) and (1) of the Act. No party has filed exceptions to these findings; accordingly, we shall adopt them.

D. *Alleged Refusal to Furnish Financial Information*

We agree with the judge that the Respondent unlawfully refused to furnish the Union with requested financial information, but only in regard to the second and third bargaining sessions. In support of the Respondent's bargaining proposals, the Respondent's spokesman, Lippolis, claimed an inability to pay. As found by the judge, Lippolis first made the claim at the second bargaining session. The Union's chief negotiator, Sturm, asked to see the Respondent's books but, according to his testimony, he did not push the issue. At the third session, Sturm asked why the Respondent was asking for givebacks when in the past it had signed the pattern agreement. Lippolis said because they could not afford it. Sturm again asked to see the Respondent's books, specifically requesting the receipts and expense journals for the past 6 months. According to Sturm, Lippolis responded, ''I'll show you

[17] Although the matter was not specifically raised in the General Counsel's exceptions, the General Counsel did raise it in the brief in support of the exceptions.

[18] The Respondent subsequently and retroactively renewed payments to the welfare fund for those employees who never struck.

mine, if you show me yours.'' Sturm said he was not the one claiming poverty. Lippolis said he had to get permission. Sturm explained that, if he was claiming poverty, the law required him to produce the books. Lippolis replied that he would let Sturm know the following Monday, February 24. The Respondent did not answer on that date and never produced the books.

We agree with the judge that the Respondent asserted an inability to pay and was therefore obligated to show its books to the Union. In *NLRB v. Truitt Mfg. Co*., 351 U.S. 149, 152–153 (1956), the court stated, ''If such an argument [an inability to pay] is important enough to present in the give and take of bargaining, it is important enough to require some sort of proof of its accuracy.'' See also the Board's discussion in *Nielsen Lithographing Co*., 305 NLRB 697 (1991), affd. sub nom. *Graphic Communications Local 508 v. NLRB*, 977 F.2d 1169 (7th Cir. 1992).[19] Accordingly, we agree with the judge that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to furnish financial information to the Union after claiming an inability to pay.[20]

We disagree with the judge, however, that the Respondent's subsequent withdrawal of the claim of inability to pay was not a ''retraction'' sufficient to obviate the Respondent's obligation to furnish the financial information.[21]

In this regard, at the fourth bargaining session, held on February 27, the Respondent's new negotiator, Frank, submitted a list of 43 proposed items. The first sentence of the first item stated, ''The Company does *not claim* inability to pay'' (emphasis in original). Although Frank continued to claim that the economy was poor, the rent rolls were down, and the profits were less than they had been, the Union acceded to the Respondent's claim that it was no longer pleading poverty. As the Union's negotiator, Sturm, testified, it was ''obvious'' to the Union that the Respondent was no longer claiming poverty. In light of the Union's admission that the Respondent was no longer claiming the inability to pay, we find that the Respondent's withdrawal of its claim was effective and that, accordingly, its obligation to provide information requested in response to its claim of inability to pay ceased.[22]

Accordingly, we find that, as of the February 27 withdrawal of its claimed inability to pay, the Respondent was no longer under any obligation to show its books to the Union. In these circumstances, we shall order the Respondent to cease and desist from any refusal to furnish financial information when claiming an inability to pay, but shall not enter an affirmative order that the Respondent now furnish that information. Because, however, the Respondent's earlier refusal violated the Act, the refusal is one factor to be considered in deciding whether the Respondent engaged in overall bad-faith bargaining.

E. *Alleged Refusal to Furnish Information About Replacements*

During the April 15 bargaining session the Union asked the Respondent for a list of names and addresses of striker replacements. The Respondent refused and did not furnish the information until its September 30 letter to the Union. The judge found, and we agree, that the Respondent violated Section 8(a)(5) and (1) of the Act by failing timely to furnish the information. The Respondent has not excepted to this finding.

F. *Alleged Threat to Strikers*

The judge credited evidence that, on July 18, Henry Nelkin recklessly drove a pickup truck over a curb, passing closely to where Pedro Correa was picketing. We agree with the judge's finding that Nelkin did so with an intent to threaten a striker in violation of Section 8(a)(1) of the Act.[23] In face of the direct and credited testimony of strikers Correa and Walbeck, we find the Respondent's witnesses' circumstantial evidence is unpersuasive. In addition, we draw an adverse inference from the Respondent's failure to call Nelkin (or to explain the failure) and infer that Nelkin's testimony would have supported that of the strikers. See, e.g., *International Automated Machines*, 285 NLRB 1122 (1987). Accordingly, we affirm the judge's 8(a)(1) finding.

G. *Alleged Surface Bargaining*

The judge dismissed the complaint allegation that the Respondent engaged in bad-faith bargaining with no intention of reaching an agreement. We reverse. Section 8(d) of the Act requires ''the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . . but such obligation does not compel either party to agree to a proposal or require the making of a con-

[19] In agreeing that the Respondent was obligated to comply with the Union's request for financial information after claiming an inability to pay, Member Browning finds it unnecessary to rely on *Nielsen Lithographing Co*., 305 NLRB 697 (1991).

[20] The Respondent's argument that Sturm attempted to ''box in'' Lippolis to stating an inability to pay is misplaced. Even if Lippolis was not a skilled negotiator, he did not seek to modify his claim even after Sturm informed him of the legal ramifications.

[21] *United Stockyards Corp*., 293 NLRB 1 (1989), cited by the judge is distinguishable. That case involved whether the employer in fact claimed poverty, not whether the employer effectively withdrew a poverty claim.

[22] We note, however, that the Respondent's abandonment of its claim of inability to pay in one of the shifting tactics on which our finding of bad-faith bargaining is partially based. See discussion at sec. G,4, below.

[23] See, e.g., *B. N. Beard Co*., 248 NLRB 198, 209 (1980) (unlawful threat by deliberately driving pickup close to picketing employee).

cession.'' In deciding whether an employer has engaged in surface or bad-faith bargaining, the Board examines the totality of the employer's conduct, both at and away from the bargaining table. *Overnite Transportation Co.*, 296 NLRB 669, 671 (1989), enfd. 938 F.2d 815 (7th Cir. 1991). Good-faith bargaining ''presupposes a desire to reach ultimate agreement, to enter into a collective bargaining contract.'' *NLRB v. Insurance Agents' Union*, 361 U.S. 477, 485 (1960). If the employer's overall conduct is designed to frustrate this goal, the Board will find that the employer has engaged in surface bargaining. For the following reasons, we find that the totality of the Respondent's conduct evinced an intent to avoid its obligation to bargain in good faith with the Union.

1. Almost at the outset of negotiations, the Respondent, on February 6, attempted to bypass the Union by offering the employees a continuation of existing terms and conditions of employment (except pensions) if they abandoned the Union. In doing so, the Respondent not only engaged in one of the indicia of bad faith listed in *Atlanta Hilton & Tower*, 271 NLRB 1600, 1603 (1984),[24] but did so in a direct attempt to get rid of the Union. Such activity at the outset of negotiations is the antithesis of good-faith bargaining.[25]

2. Despite the Respondent's blatant attempt to get rid of the Union, the parties continued to meet and bargain. The Respondent's original five proposals were further defined and narrowed. During the second and third session, the Respondent stated that its subcontracting concerns were limited to renovation and construction work and assured the Union it would not contract out unit work. It also expressed a willingness to agree to the proposed pattern agreement as a whole if its five proposals were added as a rider.

Although some progress was made during the second and third sessions, substantial time was devoted to the Respondent's claim of inability to pay and its refusal to permit the Union to examine its financial records. After the Union demanded to see the Respondent's books, the Respondent at the fourth session withdrew its claim of poverty, effectively conceding that the claim had been falsely made. We have found that the Respondent's refusal to timely furnish the financial information while claiming poverty violated the Act. We also find it is a factor indicative of bad-faith bargaining. ''Good-faith bargaining necessarily requires that claims made by either bargainer should be honest claims.'' *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 152 (1956). The making of false claims does not serve any legitimate purpose, but instead serves to impede progress at the bargaining table.

3. At the beginning of the fourth bargaining session, the Respondent submitted its list of 43 proposals, substantially changing the issues on the bargaining table. Although the Board does not evaluate whether particular proposals are acceptable or unacceptable, the Board will ''examine proposals when appropriate and consider whether, on the basis of objective factors, a demand is clearly designed to frustrate agreement on a collective-bargaining contract.'' *Reichhold Chemicals*, 288 NLRB 69 (1988). We so find in this case.

a. First, the list contains an announcement of an intent to take an action that would violate the Act. Item 4 on the list stated that the Respondent would not make contributions to the benefit funds ''until a contract is agreed to,'' a plan the Respondent immediately put into effect. By its own terms, the item was not a contract proposal; rather, it indicated that the cessation in contributions would end when an agreement was reached. As found above, the implementation was a unilateral change in violation of Section 8(a)(5) and (1) of the Act. Such a unilateral change in a mandatory subject of bargaining is one of the indicia of surface bargaining listed in *Atlanta Hilton & Tower*, supra, 271 NLRB at 1603.

Although employers and unions are permitted a wide latitude in their choices of bargaining tactics, an announced intention to violate the Act goes beyond permissible tactics. Compare *NLRB v. Insurance Agents' Union*, supra, 361 U.S. 477, in which the Supreme Court, in finding that a union's engaging in a slowdown was not an impermissible economic tactic, drew the distinction between lawful but unprotected activity and unlawful activity.

In addition, in *NLRB v. Katz*, 369 U.S. 736 (1962), the court was careful to note that the availability of economic weaponry under *Insurance Agents* is subject to one crucial qualification—the party utilizing it must at the same time be engaged in lawful bargaining. Thus, while recalling that in *Insurance Agents* it found that the Board may not decide the legitimacy of economic pressure tactics ''in support of genuine negotiations,'' *Katz* made clear that the Board ''*is* authorized to order the cessation of behavior which is in effect a refusal to negotiate.'' 369 U.S. at 747. In sum, although the Respondent's ultimatum was ostensibly aimed at impelling the Union's acceptance of the Respondent's contract proposals, this threatened termination of a benefit in the midst of negotiations was not a lawful, good-faith measure to bring the parties into agreement.

b. Second, the list of 43 proposals was a sudden, unexplained, and major departure from the Respondent's previous position. Although some of the 43 items relat-

[24] The list includes delaying tactics, unreasonable bargaining demands, unilateral changes in mandatory bargaining subjects, efforts to bypass the union, failure to designate an agent with bargaining authority, withdrawal of agreed to proposals, and arbitrary scheduling of meetings.

[25] It is noteworthy that Henry Nelkin, who was present when these remarks were made to the employees, also served as a representative of the Respondent throughout the contract negotiations.

ed to the previous five proposals, most were new proposals asking for substantially greater concessions.

As stated above, the Board does not evaluate the acceptability of particular proposals, but we will examine proposals to determine, on an objective basis, whether they are designed to frustrate reaching an agreement. Similarly, while a party is normally free to change its negotiating position in response to a change in bargaining strength,[26] we will also examine changes in bargaining position to determine if they are designed to impede agreement. In this case, it is clear that the Respondent's 43 proposals, when viewed in the totality of the circumstances, constitute merely another tactic to frustrate reaching an agreement.

The Respondent made the 43 proposals only 2 days into the strike, when it had not hired any replacements and when no strikers had returned to work. Thus, the Respondent had insufficient time to evaluate in any rational way the strike's impact or effectiveness, and there is no rational basis for finding a shift in strength to justify the Respondent's change in position between the third bargaining session on February 20 and the fourth session on February 27. Compare *Hendrick Mfg.*, supra, in which the employer toughened its bargaining position but did so only after it had weathered a strike for several months and learned that it was able to operate with fewer personnel at lower wage rates.

In addition, the Respondent's negotiator, Frank, testified that he ''had to go back and make up additional proposals, which I hoped later on I could trade off to some concessions by the union.'' This constitutes the sole record justification for proposing such dramatic changes in the Respondent's bargaining position.

We are fully aware that making proposals to be bargained away is a common bargaining tactic. Here, however, in the ensuing negotiations, Sturm called Frank's bluff by repeatedly requesting Frank to state what the Respondent really wanted. In response, Frank resisted the requests, kept most of the list on the table, and demanded that the Union first make concessions. In the face of Sturm's repeated requests to discuss the real issues, the Respondent's continued insistence on most of the items, which were designed to be bargained away, is not indicative of the advancement of a ''sincerely held'' position, but indicates that the Respondent's true, but unstated, intent was to create roadblocks to prevent reaching an agreement.

c. In concluding that the Respondent did not engage in bad-faith bargaining, the judge found that the Union ''made absolutely no concessions of its own'' and that the Union's position ''from the first to the last day'' was that the Respondent should sign the pattern agreement. The judge also found that, although the Respondent ''made regressive proposals,'' the failure to reach agreement was not caused by the Respondent because ''the Union's representative entered these negotiations with, if not a closed mind, a mind that was not particularly open.'' We find that the judge's statements about the parties' negotiating stances mischaracterized the evidence.

The Union's spokesman, Sturm, repeatedly tried to get the Respondent to discuss the real issues. Whenever the core (original five) issues were discussed, the Union engaged in meaningful negotiations. For example, the parties at several sessions discussed subcontracting, one of the Respondent's original proposals. At the February 10 session Lippolis assured Sturm that the Respondent did not intend to contract out unit work. At the April 15 session, Frank gave a similar assurance, at first. After conferring with Nelkin, however, Frank told Sturm that the Respondent wanted to preserve its option of unrestricted contracting out. Frank did not explain why, even though the Respondent's only stated concern was to subcontract renovation and construction work. At the August 11 session, Sturm offered to change the recognition clause to exclude construction work, explaining that he thought this was the only way to obtain the Union's approval. Frank replied he wanted to change the no subcontracting clause. The Respondent's lack of clarity and vacillation on subcontracting contrasts with Sturm's search for a solution.

The parties at times also discussed staffing levels. During the first three sessions, the Respondent stated it wanted a reduction to 24 employees. Later it said it wanted only 18. At the August 11 session, Sturm offered to reduce staffing to 21 from the prestrike level of 27 employees.[27] Sturm said he was willing to go to the Union for approval of such a reduction. Frank insisted on only 18 employees. Contrary to the judge, we find that Sturm's proposal to reduce staffing by nearly 23 percent was a substantial concession.

At the August 11 session, the parties also briefly discussed eliminating free apartments for assistant superintendents. In reply to Sturm's questions, Frank stated that only superintendents would be responsible for emergency calls. Sturm did not reject the proposal. Thus, progress appeared to be made on this issue as well. The evidence shows that, far from a rigid insistence on the pattern agreement, the Union was willing to discuss the issues, to seek solutions, and to make concessions.

4. Although the Respondent's representatives appeared regularly at the bargaining table and made ef-

[26] *Atlas Metal Parts Co. v. NLRB*, 660 F.2d 304, 308 (1981); *Hendrick Mfg. Co.*, 287 NLRB 310 (1987), quoting from *O'Malley Lumber Co.*, 234 NLRB 1171, 1179 (1978) (''Where an employer's economic power increases through the successful weathering of a strike, it is not unlawful for the employer to use its new-found strength to secure contract terms that it deems beneficial.'').

[27] In his discussion of surface bargaining, the judge incorrectly stated that the Union proposed a reduction to 24 employees.

forts to bring the Union to the bargaining table, we are persuaded by the totality of the evidence that the Respondent was not negotiating in good faith with a view to trying to reach a collective-bargaining agreement. Thus, the Respondent, at the outset of negotiations, sought to undermine the Union by bypassing the Union and attempting to deal directly with the employees and to persuade the employees to abandon the Union. When that tactic failed, the Respondent deceptively plead poverty during the second and third sessions. When the Union demanded to see its books, the Respondent abandoned that tactic. Instead, the Respondent pursued a different tactic; it submitted its list of 43 proposals demanding substantial additional concessions by the Union. That tactic included the announcement and the implementation of the unilateral and unlawful cessation of benefit fund contributions to nonstriking employees. Although the Respondent designed the proposals to be bargained away for concessions by the Union, the Respondent misleadingly continued to insist on most of the proposals even though the Union repeatedly attempted to get the Respondent to negotiate about the real issues.

In view of the evidence that the Union was willing to discuss the issues, to seek solutions, and to make meaningful concessions, we can only conclude that the Respondent's overall strategy was to avoid reaching an agreement. Accordingly, we find that the Respondent has engaged in surface bargaining in violation of Section 8(a)(5) and (1) of the Act.

H. *Other Issues*

In footnote 5 of his decision, the judge referred to testimony by the Respondent's negotiator, Frank, that the parties never got beyond the issues that led to impasse on August 20. In the antepenultimate sentence of his remedy discussion, the judge found that the parties were at impasse. We expressly disavow any finding or implication that the parties were at impasse. The matter was not raised by the parties or litigated at the hearing. In addition, in light of our finding that the Respondent engaged in bad-faith bargaining, there can be no impasse. *United Contractors*, 244 NLRB 72 (1979), enfd. 631 F.2d 735 (7th Cir. 1980).

CONCLUSIONS OF LAW

1. The Respondent is a single employer and is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act and is the exclusive collective-bargaining representative of the employees in the following unit:

> All service employees, including superintendents, assistant superintendents, handymen, and porters employed by the Respondent at the seven apartment complexes named in the case caption.

3. The Respondent violated Section 8(a)(1) of the Act by:

(a) Soliciting employees to get rid of the Union.

(b) Driving a pickup truck in a reckless manner so as to threaten a striker with physical harm.

4. The strike was an unfair labor practice strike from its inception.

5. The Respondent has violated Section 8(a)(5) and (1) of the Act by:

(a) Bypassing the Union, the employees' collective-bargaining representative, by making direct offers to employees of wages and other terms and conditions of employment in exchange for their abandonment of the Union.

(b) Failing to timely furnish financial information to the Union after claiming an inability to pay.

(c) Failing to timely furnish the Union with the names and addresses of striker replacements.

(d) Unilaterally ceasing to make certain fringe benefit funds payments on behalf of employees who never went on strike or who returned to work during the strike.

(e) Bargaining with the Union in bad faith with no intention of entering into any binding collective-bargaining agreement.

6. The Respondent's unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

As we have found that the Respondent has committed certain unfair labor practices, we shall order the Respondent to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

As the Respondent has engaged in bad-faith bargaining, we shall order the Respondent to bargain collectively in good faith, on request, with the Union as the exclusive bargaining representative of its employees in the above unit and, if an understanding is reached, to embody that understanding in a signed agreement.

We have found that the Respondent unlawfully ceased making contributions to the welfare, pension, and annuity funds on the behalf of nonstriking employees. Accordingly, we shall order the Respondent to make all such delinquent contributions at the 1988–1991 contract rates, including any additional amounts due the funds in accordance with *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979). In addition, the Respondent shall reimburse employees for any expenses ensuing from its failure to make the required contributions, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. 661 F.2d 940 (9th Cir. 1981), such amounts to be computed in

the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). As the Respondent retroactively restored contributions to the welfare fund on behalf of those employees who never struck, we shall not require the Respondent to make that fund whole for those employees. As the Respondent made no such restoration for those strikers who returned to work, we shall require the Respondent to make all three funds whole for those employees.

In its exceptions and brief, the Respondent contends that it should not be required to make the welfare fund whole because the returning strikers were provided with an alternative health plan. We reject that contention. ''[E]mployees have, in addition to a stake in receiving benefits negotiated on their behalf by their chosen representatives, a clear economic stake in the viability of funds to which part of their compensation is remitted.'' *Manhattan Eye, Ear, & Throat Hospital*, 300 NLRB 201, 201–202 (1990), enf. denied 942 F.2d 151 (2d Cir. 1991).[28] See also *Stone Boat Yard v. NLRB*, 715 F.2d 441, 446 (9th Cir. 1983).

We have found that the strike was an unfair labor practice strike from its inception. Because unfair labor practice strikers are entitled to special remedial provisions, even if there is no allegation of any denial of reinstatement, we shall order the Respondent to offer the strikers, on their unconditional applications to return to work, immediate and full reinstatement to their former jobs or, if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed, discharging, if necessary, any replacements hired after the onset of the strike. The Respondent shall make such strikers whole for any loss of earnings and other benefits resulting from any failure to reinstate them within 5 days of their unconditional requests, with backpay and interest to be computed in the manner prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), and *New Horizons for the Retarded*, supra.[29] Any such employees for whom employment is not immediately available shall be placed on a preferential hiring list for employment as positions become available and before other persons are hired for such work. Priority for placement on such a list shall be determined by seniority or some other nondiscriminatory test.

We have found that the Respondent unlawfully failed to timely furnish the Union with financial information and with the names and addresses of striker replacements. Although the Board's usual remedy is to order the production of the information, such remedial action is not necessary here. The Respondent effectively withdrew its claim of inability to pay, the basis for the financial information, and it furnished, belatedly, the list of names and addresses.

ORDER

The National Labor Relations Board orders that the Respondent, Fairhaven Properties, Inc., Myron Nelkin d/b/a Central Management Co., Fairhaven Apartments #1, Inc., Fairhaven Apartments #2, Inc., Fairhaven Apartments #3, Inc., Fairhaven Apartments #4, Inc., Fairhaven Apartments #5, Inc., Fairhaven Apartments #6, Inc., Fairhaven Apartments Syosset, Inc., and Fairhaven Maintenance and Construction, Inc., Garden City, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Soliciting employees to sign a petition to oust Local 32B-32J, Service Employees international Union, AFL–CIO (the Union) as their exclusive collective-bargaining representative.

(b) Driving a motor vehicle in a reckless manner so as to threaten employees with physical harm.

(c) Bypassing the employees' exclusive collective-bargaining representative by making direct offers to employees of wages and other terms and conditions of employment.

(d) Failing to timely furnish the Union with financial information while claiming an inability to pay.

(e) Failing to timely furnish the Union with the names and addresses of striker replacements.

(f) Unilaterally ceasing to make contributions to the welfare, pension, and annuity funds on behalf of strikers who returned to work and to the pension and annuity funds on behalf of employees who never went on strike.

(g) Refusing to bargain in good faith with the Union as the exclusive collective-bargaining representative of its employees.

(h) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

[28] Although the court denied enforcement, it did so on the facts of the case that, as the union had disclaimed interest in representing the employees, the employees no longer had a future interest in the stability of the fund.

[29] The Board has found that the 5-day period is a reasonable accommodation between the interests of the employees in returning to work as quickly as possible and the employer's need to effectuate that return in an orderly manner. *Drug Package Co*., 228 NLRB 108, 113 (1977), modified on other grounds 570 F.2d 1340 (8th Cir. 1978). Accordingly, if the Respondent here ignores or rejects, or has already rejected, any unconditional offer to return to work, unduly delays its response to such an offer, or attaches unlawful conditions to its offer of reinstatement, the 5-day period serves no useful purpose and backpay will commence as of the unconditional offer to return to work. *Newport News Shipbuilding*, 236 NLRB 1637, 1638 (1978), enfd. 602 F.2d 73 (4th Cir. 1979).

(a) On request, bargain in good faith with the Union as the exclusive collective-bargaining representative of its service employees concerning terms and conditions of employment and, if an understanding is reached, embody it in a signed agreement.

(b) Make whole employees and the welfare, pension, and annuity funds in the manner set forth in the remedy section of this Decision and Order.

(c) Accord all striking employees, from the date of the strike, the rights of and privileges of unfair labor practice strikers, including, on their application, offering strikers immediate and full reinstatement to their former jobs or, if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed, discharging, if necessary, any replacements hired after the start of the strike, and make such employees whole, with interest, in the manner set forth in the remedy section of this Decision and Order for any loss of earnings or other benefits resulting from any failure to reinstate them on unconditional request.

(d) Preserve and, on request, make available to the Board or its agents for examination and copying all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of money and any backpay due under the terms of this Order.

(e) Post at its facilities in Long Island, New York, where unit employees work, copies of the attached notice marked ''Appendix.''[30] Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[30] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we have violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT solicit employees to sign a petition to oust Local 32B-32J, Service Employees International Union, AFL–CIO (the Union) as their exclusive collective-bargaining representative.

WE WILL NOT drive motor vehicles in a reckless manner so as to threaten employees with physical harm.

WE WILL NOT bypass the employees' exclusive collective-bargaining representative by making them direct offers of wages and other terms and conditions of employment in exchange for their abandonment of the Union.

WE WILL NOT fail to timely furnish the Union with financial information while claiming an inability to pay.

WE WILL NOT fail to timely furnish the Union with the names and addresses of striker replacements.

WE WILL NOT unilaterally cease to make contributions to the welfare, pension, and annuity funds on behalf of strikers who returned to work and to the pension and annuity funds on behalf of employees who never struck.

WE WILL NOT refuse to bargain in good faith with the Union as the exclusive representative of the employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain in good faith with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit.

WE WILL make whole employees and the welfare, pension, and annuity funds.

WE WILL, from the date of the strike, reinstate on request all striking employees to their former jobs or, if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed, discharging, if necessary, any replacements hired after the start of the strike, and make such employees whole, with interest, for any loss of earnings or other benefits resulting from any failure to reinstate them on unconditional request.

FAIRHAVEN PROPERTIES, INC., MYRON NELKIN D/B/A CENTRAL MANAGEMENT CO.; FAIRHAVEN APARTMENTS #1, INC.; FAIRHAVEN APARTMENTS #2, INC.; FAIRHAVEN APARTMENTS #3, INC.; FAIRHAVEN APARTMENTS #4, INC.; FAIRHAVEN APARTMENTS #5, INC., FAIRHAVEN APARTMENTS #6, INC.; FAIRHAVEN APARTMENTS SYOSSET, INC.; AND FAIRHAVEN MAINTENANCE AND CONSTRUCTION, INC.

Ann S. Goldwater Esq., for the General Counsel.
Neil Frank Esq. and *Alan Breslow Esq*., for the Respondent.

DECISION

STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge. This case was tried in Brooklyn, New York, on December 16 and 17, and 18, 1992. The charges and amended charges were filed on February 12 and 28, March 17 and 26, May 13, and August 31, 1992. After a series of complaints were issued by the Regional Director in relation to these charges, he issued on December 16, 1992, an amended consolidated complaint which put into a single document all the allegations made against the Respondents. In substance, the allegations are as follows:

1. That on or about February 6, 1992, the Respondent by Anton Vuklevic, a supervisor, and Henry Nelkin, its vice president, promised employees that it would maintain their existing wages and benefits (except for the pension benefit), if they abandoned their membership in the Union; urged them to sign a document indicating their desire to forgo union representation, and interrogated employees as to their willingness to sign such document.

2. That since February 25, 1992, some of the Respondent's employees went out on a strike which was caused by the alleged unfair labor practices described above in paragraph 1. It also is alleged that the strike was prolonged by the alleged unfair labor practices described below. In this respect, it is noted that some of the strikers had not, as of the time of the hearing, requested their jobs back and that others had already returned to work. The Respondent stated at the hearing (in conformity to a letter previously sent to the Union on May 22, 1992) that it did not consider the replacements to be permanent and that it would reinstate any striker who offered to return. (In the context of the present proceeding, the General Counsel does not contend that the Respondent has refused to reinstate any striker who has offered to return to work.)

3. That on July 18, 1992, the Respondent, by Nelkin, drove a vehicle recklessly so as to threaten employees on the picket line with physical harm.

4. That the Respondent has bargained in bad faith by the following acts:

(a) Although stating at the first three bargaining sessions that it could not afford to meet the Union's demands, it refused to furnish financial information when such information was requested at the meeting of February 27, 1992, asserting instead that it no longer was claiming ''inability to pay.''

(b) That the Respondent sought substantial concessions from the preceding contract and offered terms and conditions to the Union which were less favorable than those offered directly to the employees if they would abandon the Union.

(c) That the Respondent, after the first three bargaining sessions, drastically revised its contract proposals and demanded greater concessions from the Union than what it had sought up to that time. This allegedly took place since on or after February 27, 1992, 2 days after the Union commenced a strike.

5. That the Respondent, since about February 27, 1992, has unilaterally ceased making contributions to the Welfare, Pension, and Annuity Funds, as required pursuant to the preexisting but expired collective-bargaining agreement between the parties on behalf of employees who did not engage in the strike or who abandoned the strike.

6. That as to employees who abandoned the strike and returned to work, the Respondent enrolled them in its own health plan.

7. That the Respondent, from April 15 to September 30, 1992, refused to furnish the names and addresses of all strike replacements to the Union. In essence, the allegation here is that the Respondent failed to deliver this information in a timely manner.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The Respondents are related companies having common ownership and management. They administer a common labor relations policy and therefore are construed as a joint employer.

The Company and the Union have had a collective-bargaining relationship since about 1983. The employees rep-

resented by the Union are the porters, maintenance men, superintendents, and assistant superintendents who work at five separate apartment building complexes which are located in Hicksville, Syosset, Smithtown, Carle Place, and Mineola. For some reason, there have been separate contracts between the Union and the Company regarding each of the foregoing locations.

The most recently executed set of contracts between the Company and the Union ran for a term from June 21, 1988, to June 20, 1991. On June 20, 1991, that contract expired and no new contract has been reached.

Ira Sturm, the Union's attorney, testified that the normal practice in the industry is for the Union to first negotiate with an association of New York City apartment owners called the Realty Advisory Board (RAB). When a contract has been reached between the Union and the RAB, the Union then formulates a proposed contract for Long Island apartment owners which it sends out for signature. The Long Island contract, according to Sturm, is essentially based on the language and rate increases negotiated between the Union and the RAB, albeit the actual wage rates and benefits may be somewhat lower in absolute terms.

At some point during 1991, a contract was reached between the Union and the RAB and the Union thereupon sent out to Fairhaven, its proposed Long Island contract. For a time the Company did not respond but ultimately, James Edwards, a union business agent, was advised that the Company wanted to sit down and negotiate the terms of a new contract rather than simply signing the proffered document. As a result, a series of bargaining sessions were conducted beginning on January 29, 1992. In all, the parties met on eight occasions from January 29 to August 20, 1992.

It is noted that the bargaining should be separated into two stages. First there were the three meetings held in January and February 1992 when the Company was represented by a person (Robert Lippolis), who was without labor relations experience. The remainder were held after the Union commenced a strike on February 25 and the Company hired Neil Frank, a labor lawyer, to represent them. During the entire course of the negotiations, the Union's attorney, Ira Sturm, was its chief spokesman.

Before the negotiations started, there occurred an incident on February 6, 1991, where Anton Vuklevic, a supervisor, approached some of the employees at at least two of the locations and asked them to sign a piece of paper indicating that they wanted to get rid of the Union. The evidence shows that Vuklevic told employees that if they got rid of the Union, their wages and benefits would remain the same, albeit without the Pension Plan. The employees, after asking for time to consider this proposition, refused to sign the petition when asked to do so later in the day. After that the matter was dropped. The Employer did not put on any witnesses to rebut these assertions.

The events described in the preceding paragraph all occurred on or about February 6, 1992, and the Union filed the unfair labor practice charge concerning this incident in Case 29–CA–16346, on February 13, 1992. Being the smart lawyer that he is, Sturm held a meeting with the shop steward and told him that if the Union called a strike, it would be to protest the unfair labor practices that the Company committed on February 6. This obviously was done to lay the foundation for a later claim that any foreseeable strike would be, at least in part, an unfair labor practice strike which therefore would protect the striking employees from being permanently replaced. *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270 (1956).

The first meeting was held on January 29, 1992. As noted above, the Union's chief spokesman was Ira Sturm and the Company's chief spokesman was Robert Lippolis, who is a vice president of the Company. According to Sturm, the Company, through Lippolis, said that the Company was losing money and that it needed relief. He states that Lippolis said that the Company wanted (1) a 1-year wage freeze; (2) the right to subcontract; (3) the right to reduce by half the number of superintendents or assistant superintendents who had free apartments; (4) the right to reduce the staffing level to 24 from the current level of 27 or 28;[1] and (5) no retroactivity, meaning that whatever agreement was reached its effective date would be from the date of signing and not from the date that the prior contract had expired on June 20, 1991.

Lippolis' testimony regarding the January 29 meeting was that the Union expected the Company to sign the proffered contract as is, but that he refused to do so, stating that the economy was bad and that the rent rolls were down. Lippolis listed the concessions the Company wanted (described above), and states that when he did so, Edwards said that he was crazy. According to Lippolis, Sturm said that the Union's proffered contract was the only contract that was available. (I believe this last statement because it is clear from the entire course of negotiations that the Union never once proposed a modification of its proffered contract and never once made a counteroffer to the Company's proposals.)

The next meeting was held on February 10, 1992. Sturm contends that at this meeting, Lippolis said that the employer was losing money and couldn't afford to pay what they were paying. He states, and Lippolis does not assert to the contrary, that the Company repeated the demands it made during the first meeting. The only real difference in the testimony is that Lippolis denies stating that the Company was losing money or could not afford to pay.

The final meeting before the strike was held on February 20, 1992. The same issues were gone over and neither side backed down on their respective positions. In this regard, Sturm asked how come the Company was asking for givebacks when in the past they always had signed the standard form agreement. Sturm testified that when Lippolis again claimed that the Company couldn't afford any increases, he asked that the Company turn over its financial books and records, specifically the receipts and expense journals for the last 6 months. According to Sturm, at a union caucus, he told the shop steward that there likely was going to be a strike and that the Union, based on the February 6 incidents, would characterize the strike as an unfair labor practice strike because that would give employees the unconditional right to get their jobs back. After the caucus, Sturm told the Company that they weren't getting anywhere and to let him know by Monday if his information request was going to be honored.

[1] Under the expired contract, the Employer was unable to reduce the number of bargaining unit employees in its work force without the consent of the Union. Art. X, sec. 19.

Lippolis testified that he suggested that the Company might be willing to sign the proffered contract if the concessions the Company was seeking were put into a rider to the agreement. He recalls that at the February 20 meeting, the Union asked to see the Company's books. Although asserting that he absolutely did not say that the Company could not afford the Union's demands, his bargaining notes for that day state:

> We made it clear that we were not able to afford the increases contained in the new contract but that we would not pay the increases as they were.

At the conclusion of the February 20 meeting, neither party had retreated from their original positions and it was apparent to all that a strike was imminent.[2]

On Friday, February 21, Neil Frank was retained to represent the Respondent and on Monday, February 24, he called up Sturm to ask for a meeting which was set for February 27, 1992.

On February 25, 1992, the Union called a strike. In this respect, the employees of four out of the five apartment complexes were called out on strike. The people employed at the Hicksville complex were not asked to strike and they continued to work. In relation to the strike, the Union used picket signs claiming that the strike was an unfair labor practice strike. It is noted that within about a month of the strike's commencement, a number of employees resigned their membership in the Union, abandoned the strike, and returned to work.

Prior to the meeting of February 27, Frank reviewed the expired contract, compared it with the proffered contract, and drafted a set of proposals which he presented to the Union at the meeting. These proposals included the five issues that the Company had raised during the initial meetings. Some of the other company demands (about 11) simply were demands to delete from the new contract any language or provision that the Union had changed from the old contract. (For example the Union's new contract provided for paternity and maternity leave without pay and no such provision is contained in the expired contract.) Other proposals constituted further give-backs which Frank testified were put in the company demands for the purpose of being bargained away. He testified that he did this as a tactical move in the hope that this would break the existing deadlock. (Indeed, he did drop all of these items by August 1992.) At the top of the Company's proffer was paragraph 1 which reads:

> 1. The Company does not claim inability to pay. It makes these proposals in view of the recession, the affect on its ability to rent apartments to make a fair profit, and the availability of people willing to work at current wages.

When the Union was presented with the Company's written demands, they left the meeting in a huff.

On February 28, 1992, Frank sent a letter to Sturm as follows:

> Your walkout from negotiations last night, and failure to consider or discuss the company's contract proposals makes it impossible to settle either the strike or the terms of a contract. The parties are clearly at an impasse that can only be broken by your decision to resume negotiations. If you reconsider your decision not to negotiate feel free to contact me. We remain ready to meet at any convenient time. Since the company paid for the room last night, we will expect the union to pay the next time. I enclose another copy of the company's contract proposal. Perhaps if you review it, you will find grounds for compromise.
>
> As you are aware, the superintendents and assistant superintendents received the use of an apartment and utilities without charge as part of their compensation for services to the company. Two superintendents and assistant superintendents are on strike. Since these employees are not working actively for the company, the company will begin billing and collecting rent for their apartments and charges for utilities effective March 1, 1992.

The parties stipulated that:

> 1. Since in or about February 1992, Respondents ceased making contributions to the Union's pension fund, annuity fund and health and welfare fund for all employees who abandoned the strike and who returned to work.
>
> 2. Since in or about February 1992, Respondents have made contributions to the Union's health and welfare fund for five employees who did not strike, but ceased making contributions to the pension fund and annuity fund for this group of employees.

On March 24, 1992, Frank sent another letter to Sturm as follows:

> I've received your letter of March 20, 1992,[3] and have asked my client to provide me with any relevant materials. I will forward them to you upon receipt. We are prepared to engage in negotiations, at any time, without pre-conditions. Of course, we, and not you, will determine our method of bargaining. You walked out of negotiations on February 27. If you are interested in resuming negotiations, you can call me to arrange a meeting. We will not meet at the Union's office. If the Island Inn is not to your liking, I am sure a different neutral site can be arranged.

On April 14, 1992, the parties met again. According to Sturm, he asked why the Company insisted on a wage freeze inasmuch as it no longer was claiming inability to pay. He states that when Frank responded that the rental rolls were down, he asked to see the rent records. Frank responded that the Company's position was not that they couldn't afford to pay an increase, but that they didn't want to. Sturm states that he asked for the names and addresses of the strike replacements and Frank told him that he was reluctant to give that information because there had been some acts of vandal-

[2] Sturm testified that at this meeting, the Union's representatives told the Company that they were giving 24-hour notice that there might be a strike, and that such a strike would be an unfair labor practice strike.

[3] The Union's March 20 letter was not offered into evidence.

ism to the Company's properties.[4] The Employer demanded that the staffing level be set at 18 rather than the 24 it had demanded before the strike and Sturm suggested that any reduction in staff might be accomplished by attrition. According to Sturm, when he asked Frank what he really wanted, Frank responded that he wanted to know that the Union was willing to modify its standard agreement. Sturm told Frank that he was unwilling to make any concession until he heard what the Company really wanted.

At the April 14 meeting, there also was some discussion about the Company's cessation of payments to the Union's benefit funds set forth in the contract which had expired on June 20, 1992. In this respect, the Company had continued to make payments to the funds after that contract expired but ceased doing so from the date that the strike began. That is, from February 25, 1992, the Company stopped making payments to the funds on behalf of all of its bargaining unit employees. At the April 14 meeting, Sturm claimed that the Company should have continued making contributions to the funds on behalf of the five Hicksville employees who never went on strike and and on behalf of those employees who abandoned the strike and returned to work. Subsequently, in May 1992, the Company resumed payments to the Union's health fund on behalf of the nonstriking Hicksville employees and made such payments retroactive to February 1992. (The Company's payments were made at the rates set forth in the expired contract.) It did not however, resume making contributions to the Pension or other funds on their behalf. As to those employees who abandoned the strike, the Company did not resume contributions to any of the union benefit plans on their behalf but it did place them into a Health Plan which covered its managerial and clerical workers called the FMC plan. As to those employees who remained on strike, no payments to any funds were made for them.

On April 21, 1992, Frank sent a letter to Sturm. This stated that the Company was not asserting that it could not afford to pay the increases demanded by the Union. Frank stated that with unemployment at high levels, the Company could find plenty of qualified people to work for less and that, although the Company was making a profit, it was not as profitable as it wished.

On May 5, 1992, Frank told Sturm that the Company would resume making contributions to the Union's health fund on behalf of the five Hicksville employees who never struck but would cover any employees who returned to work from the strike under its own FMC plan. During this meeting, Frank said that he had some new company proposals (concessions), but would not present them until the Union made a counterproposal of its own. Sturm told Frank that it made no sense for the Union to make a counterproposal at this time, as it would just be ''bargaining against itself.'' Sturm said that if the employer had a new proposal, it should be put on the table and maybe that would produce some movement. According to Sturm, Frank responded that he would not do so unless the Union made a concession first. Sturm responded that at the last meeting before the strike, the Employer had no problem with the form of the contract and that there were only four outstanding issues. Sturm also said that he objected to the fact that Frank had come into the negotiations and had put a whole bunch of new proposals on the table. It is noted that as of this date, or any date thereafter, the Union made absolutely no concessions on its side, except to the limited extent that it indicated that it was willing to talk about reducing the manning requirement.

On May 18, 1992, Frank sent the following letter to Sturm:

> At our negotiations you requested certain information which we respond to as follows:
>
> 1. Names of employees with perfect attendance in 1991: Jilberto Aravena, Chris Bondi, Michael McCallion, John Chimenti, Michael Waldek.
>
> 2. A copy of the Health Plan being provide to certain working bargaining unit members is enclosed.
>
> 3. The cost of the plan is:
>
> Single $149.88
> Employee + 1 $213.65
> Family $363.50
>
> The company's position remains as it has during negotiations; it will not make any payments to the union benefit plans unless and until a new collective bargaining agreement is signed. We are available to negotiate about this and any other topic at your convenience.

By letter dated May 29, 1992, Frank withdrew certain of the company demands. Sturm did not respond, testifying that he felt that the concessions offered the Company were inconsequential and insufficient.

By letter dated July 23, 1992, Frank withdrew another set of company demands. Sturm replied on August 3 as follows:

> I am in receipt of your letter of July 23, 1992. I do not think that this unilateral act constitutes any sincere effort by your client to remedy its outstanding unfair labor practices. Should you feel otherwise or wish to discuss settlement of the unfair labor practices, please advise.

The penultimate meeting was held on August 11, 1992. There was considerable discussion about the staffing level with the Employer wanting to limit the staff to 18 and the Union stating that 27 or 28 people were necessary to do all the work. According to Sturm, he suggested that he was willing to go back to the Union's president and ask for permission to have a unit of 21. The parties also discussed the issue of subcontracting wherein the Employer had demanded throughout the negotiations that it should have the right to subcontract out certain heavy or construction-type work such as roof repairs, etc. In this context, the Employer asked for a modification of the existing subcontracting clause whereas the Union wanted to keep that clause intact and deal with the issue by modifying the recognition clause. According to Frank, at one point during this meeting, Sturm asked if there could be a contract if the parties resolved the staffing and the subcontracting issues. Frank replied that there still were other issues that had to be resolved such as the Company's demands for a wage freeze and elimination of free apartments for some of the employees.

[4] According to Frank, the Company, at that time, had not yet hired any employees as replacement. He states that the Company used employees it had at other operations to fill in on a temporary basis for the strikers. Frank testified that at some later point, the Company did hire temporary replacements.

The final bargaining session was held on August 20, 1992. After a caucus, Sturm asked Frank to ''tell me exactly what you want, that way I will know what is important and where we are going.'' He states that Frank said that the following items were important from the Employer's point of view: (1) a 1-year wage freeze after which the parties would negotiate wages for the next 2 years; (2) the right to subcontract; (3) no checkoff of union dues; (4) no contributions to health and welfare funds until a new contract was signed; (5) no retroactivity; (6) elimination of the clause in the old contract establishing a contract arbitrator substituting instead either the AAA or the Federal Mediation and Conciliation Service; (7) amendment of article 7 of the old contract to allow subcontracting of construction type work; (8) elimination of the cost-of-living provisions of the Union's proposed contract; (10) elimination of the Union's proposed increase in meal allowances; (11) free apartments only to superintendents; (12) no perfect attendance bonus; (13) no increase in contribution rates to the legal and training funds; (14) elimination of the paternity-maternity leave provision in the Union's proposed contract; and (15) elimination of the wage scale set forth in the super rider to the Union's proposed contract. According to Sturm, he asked what Frank's problem was with the paternity-maternity leave clause as this was a noncost item. Frank replied that this provision in the Union's proposed contract was a new benefit over and above what was contained in the previous contract and he was not willing to give any new benefits. According to Frank, he told Sturm that the Company's purpose at the negotiations ''was not to give the Union more; it was to give them less.''[5] After another caucus, Sturm told the Employer that there was no point in returning to the negotiations.

Finally, there was evidence which I credit, that on July 18, 1992, Henry Nelkin recklessly drove the Company's white Toyota pickup onto the curb and passed closely by where Pedro Correa was picketing in such a manner as to frighten him.

III. ANALYSIS

A. *The Solicitation to Sign the Petition*

On February 6, 1992, the Employer's supervisors, on several occasions during the day, solicited employees to sign a petition to oust the Union as their bargaining representative. Contrary to the General Counsel, I cannot conclude that this was accompanied by a promise of benefit. At most, the employees were told that their existing benefits, except for the pension fund, would remain the same with or without a union. Nor, in my opinion, did this event, amount to direct dealing as alleged by the General Counsel.[6]

On the other hand, I do think that the solicitation of such a petition amounts to coercive interrogation as it puts the employees in the position of having to indicate whether or not they wished to be represented by the Union. This would be analogous to the situation where a preelection distribution of ''Vote No'' buttons to employees by a supervisor would constitute illegal interrogation as the offer requires the employees to make an observable choice when accepting or rejecting the buttons. *Kurz-Kasch, Inc*., 239 NLRB 1044 (1978).

B. *The Request for Financial Information*

The credible evidence convinces me that during the second and third negotiation sessions, the Employer by Lippolis in seeking substantial give-backs, asserted that the Company was losing money and could not afford to pay.

It is also clear that after Lippolis was replaced by Frank, the latter couched his argument in terms of the Company's unwillingness to pay rather than its inability to pay. After Frank was retained, the Company while still talking about the poor economy, the reduction in its rent rolls, and the lessening of its profits, asserted that it was not pleading inability to pay as the justification for its demand for give-backs.

In *NLRB v. Truitt Mfg. Co*., 351 U.S. 149 (1956), the Court stated:

> Good-faith bargaining necessarily requires that claims made by either bargainer should be honest claims. This is true about an asserted inability to pay an increase in wages. If such an argument is important enough to present in the give and take of bargaining, it is important enough to require some sort of proof of its accuracy. And it would certainly not be farfetched for a trier of fact to reach the conclusion that bargaining lacks good faith when an employer mechanically repeats a claim of inability to pay without making the slightest effort to substantiate the claim. Such has been the holding of the Labor Board since shortly after the passage of the Wagner Act. In *Pioneer Pearl Button Co*., decided in 1936, where the employer's representative relied on the company's asserted ''poor financial condition,'' the Board said: ''He did no more than take refuge in the assertion that the respondent's financial condition was poor; he refused either to prove his statement, or to permit independent verification. This is not collective bargaining.''. . . This was the position of the Board when the Taft-Hartley Act was passed in 1947 and has been its position ever since. We agree with the Board that a refusal to attempt to substantiate a claim of inability to pay increased wages may support a finding of a failure to bargain in good faith.
>
> The Board concluded that under the facts and circumstances of this case the respondent was guilty of an unfair labor practice in failing to bargain in good faith. We see no reason to disturb the findings of the Board. We do not hold, however, that in every case in which economic inability is raised as an argument against increased wages it automatically follows that the employees are entitled to substantiating evidence. Each case must turn upon its particular facts. The inquiry must always be whether or not under the circumstances of the

[5] According to Frank, the Company never made a wage proposal apart from its demand for a 1-year wage freeze. That is, he testified without contradiction that the parties never got beyond the issues that led to the impasse on August 20, 1992, and neither side ever explored what the wages should be in the second and third year of a contract.

[6] *Schmidt-Tiago Construction Co*., 286 NLRB 342, 364 (1987), cited by the General Counsel, is inapposite. In that case, the employer, during negotiations, offered strikers terms and conditions of employment before making such offers to the Union while, at the same time, telling the strikers that it would never sign an agreement with the Union.

> particular case the statutory obligation to bargain in good faith has been met. . . . [W]e conclude that there is support in the record for the conclusion of the Board here that respondents did not bargain in good faith.

There is no question in my mind that when Lippolis asserted that the Company's bargaining demands were based on its lack of profitability and its inability to pay, the Union was thereupon entitled to see and review the Company's financial records to test that claim. Having let the cat out of the bag, I do not think that the subsequent statements by Frank constituted a ''retraction'' which would operate to obviate the Company's previously incurred obligation. Having raised this claim during the initial set of negotiations, I don't believe that the Company can so easily escape the obligation to furnish information merely by couching its bargaining arguments in a slightly different semantic mantle. See *United Stockyards Corp*., 293 NLRB 1 (1989). In my opinion, if Frank, upon taking up the Company's cudgels, wanted to cure the violation, he was required to furnish the records and start afresh.[7]

C. *Refusal to Furnish Information Regarding Strike Replacements*

After the strike commenced, the Company utilized employees of other operations to perform the struck work. At some point in time before August 1992, the Company also hired new people to work as temporary replacements.

The evidence shows that during the course of the negotiations, the Union, on April 15, 1992, requested the names and addresses of any strike replacements.

The Company's immediate reaction to the Union's request was to assert that it was unwilling to give this information because of acts of vandalism that had been committed in connection with the strike. These were, however, limited in scope and the incidents allegedly occurred in February and March 1992. There was no contention by the Company that the Union or the strikers had engaged in any acts or threats against any strike replacements or other persons.

The information requested was ultimately turned over to the Union on September 31, 1992, more than 5 months after the initial request.

In *Georgetown Holiday Inn*, 235 NLRB 485, 486 (1978), the Board specifically held that the employer violated the Act when, during contract negotiations, it failed within a reasonable period of time, to provide the Union with the names and addresses of employees it had hired to replace the strikers. In *Burkart Foam*, 283 NLRB 351, 356 (1987), enfd. 848 F.2d 825 (7th Cir. 1988), the administrative law judge concluded that such information should be furnished and could only be refused if there was a ''likelihood of a clear and present danger to the employees involved.'' In affirming the Board's decision, the court stated, inter alia:

> Unlike the cases Burkart relies on, here there is no evidence of numerous incidents of union violence and harassment of replacements . . . . See *Soule Glass*, 652 F.2d at 1097 (violence against replacements included broken windows, slashed tires, assaults and verbal threats); *Shell Oil Co. v. NLRB*, 457 F.2d 615, 616 (9th Cir. 1972) (parties stipulated that violence against the employees who returned to work during the strike occurred both during the strike and for an indeterminate period after the strike ended); *Sign & Pictorial Union Local 1175 v. NLRB*, 419 F.2d 726, 738 (D.C. Cir. 1969) (uncontested facts revealed that striking employees harassed, threatened and assaulted replacements) . . . .

In view of the above, I conclude that the information was relevant; that it was not timely furnished and that the few vandalism incidents alleged by the Respondent did not pose a danger to the replacements. I therefore conclude that in this respect the Respondent has violated Section 8(a)(1) and (5) of the Act.

D. *Alleged Unilateral Changes*

The 1988 contract which expired on June 20, 1991, required that the Employer make contributions, on behalf of its employees, to a Welfare Fund, a Pension Fund, an Education Fund, a Prepaid Legal Plan, and an Annuity Fund. The complaint alleges that since February 27, 1992, the Respondent unilaterally ceased making contributions to the Welfare Fund, the Pension Fund, and the Annuity Fund on behalf of those of the bargaining unit employees who either did not go out on strike (the five Hicksville employees), or abandoned the strike and returned to work. The complaint does not allege that the Company had any obligation to subsidize the strike against itself by making payments on behalf of striking employees. Nor does it allege that the Company violated the Act by not making contributions to these funds on behalf of replacement workers.[8]

The evidence here shows that subsequent to the expiration of the collective-bargaining agreement, the Company continued to make payment to all of the contractual funds. However, when the strike commenced on February 25, 1992, the Company ceased making all such payments on behalf of all of its bargaining unit employees. Thereafter, at the meeting on February 27, 1992, the Company notified the Union that it would not make any such payments until and unless a new contract was signed. Frank explained that the purpose of this was to put pressure on the Union to make concessions by ''starving'' the funds. Neither at this nor any other point dur-

[7] This allegation in the complaint was written in a rather peculiar manner. Pars. 28, 29, and 30 allege that the Company refused to furnish the names and addresses of strike replacements upon the Union's request of April 15, 1992. Unlike those allegations which are pleaded in a straightforward manner, the complaint alleges at par. 27 that the Respondent engaged in bad-faith bargaining by, among other things, changing its position regarding inability to pay ''when confronted with the Union's request for books and records . . . [and] refusing to provide such information on the grounds that it was no longer asserting such claim.''

It could be argued that the intention of the complaint was only to allege that the violation consisted of the change of position and not the refusal to furnish the information per se. Nevertheless, the General Counsel, at the hearing, put the Respondent on notice that she was alleging that the Company's failure to furnish financial information was itself a violation of the Act. As this is sufficiently related to the complaint allegations as written, and the allegation was fully litigated, I see no reason to preclude the 8(a)(5) finding.

[8] In *Marbro Co*., 284 NLRB 1303 (1987), the Board stated that a company may unilaterally change terms and conditions of employment for those employees who were hired as striker replacements.

ing the negotiations did the Employer propose to eliminate these benefit funds or propose to substitute different plans to accomplish the same purposes. It also is clear that at the time the Company ceased making these payments, there was no impasse in the negotiations.

In May 1992, the Company decided to resume payments to the Union's Welfare Fund on behalf of the five Hicksville employees who never engaged in the strike. In doing so, the Company paid the money owed, retroactive to February 1992, so that there was no break in their coverage. It did not, however, resume payments to the Pension Fund or Annuity Fund on their behalf. As to those employees who abandoned the strike and returned to work, these people were placed into the Company's medical plan covering managerial and clerical employees. As to returning strikers, the Company made no payments on their behalf to the Union's Welfare Fund, the Pension Fund, or the Annuity Fund.

Pursuant to the National Labor Relations Act, the expiration of a collective-bargaining agreement does not give an employer a license to unilaterally modify or terminate the then-existing terms and conditions of employment as they are defined in the contract. On the contrary, an employer is required to maintain such terms and conditions, including payments to benefit funds (but not remittance of union dues) until a new agreement is reached which modifies or terminates such obligations; or until after an impasse is reached whereupon a company may unilaterally implement some or all of its last contract offer;[9] or until the Employer is legally discharged from its obligation to recognize and bargain with the Union. (For example, if employees, pursuant to a Board election, vote the Union out.) Moreover, while it is permissible for an employer in a strike situation to unilaterally establish terms and conditions for newly hired employees who are hired as strike replacements, it cannot do the same for those people who were employed before the commencement of the strike and whose working conditions were defined by the expired contract. This latter group would include employees who never went out on strike and employees who abandoned a strike and returned to work. *Marbro Co.*, supra.

Based on the above, I conclude that the employer violated Section 8(a)(1) and (5) of the Act by:

1. Failing to make payments to the Pension, Welfare, and Annuity Funds established pursuant to the expired contract on behalf of all bargaining unit employees who abandoned the strike and returned to work.

2. Failing to make payments to the Pension and Annuity Funds on behalf of those bargaining unit employees who never participated in the strike.

E. *Bad Driving*

Having concluded that Henry Nelkin, on July 18, 1992, drove in a reckless manner with the intention of threatening a striker with physical harm, I conclude that this act constituted a violation of Section 8(a)(1) of the Act. *Daniel Finley Allen & Co.*, 303 NLRB 846 (1991).

[9] See *Taft Broadcasting*, 163 NLRB 475 (1967), affd. 395 F.2d 622 (D.C. Cir. 1968); *Colorado Ute Electric Assn.*, 295 NLRB 607, 609 (1989); and *Sacramento Union*, 291 NLRB 552, (1988).

F. *Alleged Surface Bargaining*

The General Counsel alleges that the Respondent, by its conduct both at and away from the bargaining table, including all of the acts described above, engaged in bad-faith bargaining with no intention of reaching an agreement.

Section 8(d) of the Act does not compel either party in a collective-bargaining relationship to agree to a proposal or to make a concession. As to mandatory subjects of bargaining (relating to wages, hours, and other terms and conditions of employment), the Act does not require either party to yield or compromise its position. As stated by the Supreme Court in *NLRB v. American National Insurance Co.*, 343 U.S. 395, 404 (1952):

> [T]he Board may not either directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements.

The Court further stated in *H. K. Porter Co. v. NLRB*, 397 U.S. 99, 107–108 (1970):

> It is implicit in the entire structure of the Act that the Board acts to oversee and referee the process of collective bargaining, leaving the results of the contents to the bargaining strengths of the parties. . . . While the parties' freedom of contract is not absolute under the Act, allowing the Board to compel agreement when the parties themselves are unable to agree would violate the fundamental premises on which the Act is based—private bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract.

The Supreme Court in *NLRB v. Insurance Agents*, 361 U.S. 477, 489 (1960), stated:

> The presence of economic weapons in reserve, and their actual exercise on occasion by the parties, is part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized. . . . [T]he truth of the matter is that at the present statutory stage of national labor relations policy, the two factors—necessity for good-faith bargaining between parties, and the availability of economic pressure devices to each to make the party incline to agree on one's terms—exist side by side.

In *Peelle Co.*, 289 NLRB 113, 120 (1988), I stated:

> It therefore is not necessarily unlawful for the stronger side to make demands or take positions consistent with its strength. Quite obviously, the respective strength of a union versus a company in bargaining is largely dependent on the support of the employees it represents, their willingness to strike, and the vulnerability of the company to a strike. . . . Furthermore, collective bargaining is basically a two-way street. Thus although a union may lawfully make demands designed to improve existing employee wages and benefits, there is nothing in the Act that denies an employer the right, . . . to demand give-backs.[10]

[10] See *Rescar, Inc.*, 274 NLRB 1, 2 (1985).

Although a company may press for favorable contract terms, it may not engage in futile or sham negotiations with the intention of never reaching an agreement. *NLRB v. Herman Sausage Co*., 275 F.2d 229, 232 (5th Cir. 1960). In *Abingdon Nursing Center*, 197 NLRB 781, 787 (1972), the Board stated:

> Good faith, or want of it, is concerned essentially with a state of mind. . . . That determination must be based upon reasonable inference drawn from the totality of conduct evidencing the state of mind with which the employer entered into and participated in the bargaining process. . . . All aspects of the Respondent's bargaining and related conduct must be considered in unity, not as separate fragments each to be assessed in isolation.

Although the Board may look at specific contract proposals in the context of a surface bargaining allegation, it generally will refrain from deciding that particular proposals (if involving mandatory subjects of bargaining) are either ''acceptable'' or ''unacceptable'' and will avoid making purely subjective judgments concerning the substance of proposals. *Reichold Chemicals*, 288 NLRB 69 (1988).[11]

There is nothing intrinsically unlawful where either a union or a company changing its position during the course of negotiations, albeit if joined with other conduct, it may be used as an indicia of bad faith. Compare *Hendrick Mfg. Co*., 287 NLRB 310 (1987), and *Hickinbotham Bros*., 254 NLRB 96, 102–103 (1981), with *Houston County Electric Cooperative*, 285 NLRB 1213, 1214–1215 (1987). The test ultimately must be whether the conduct of a party to negotiations, in its totality, reveals whether or not it intends to reach an agreement.

In the present case, I do not believe that the General Counsel has proven that the Respondent had no intention of reaching an agreement with the Union.

When the negotiations opened, the Company had five major demands which it presented to the Union. The Union, for its part, basically insisted that the Company sign, as is, the Long Island pattern agreement. There was nothing in the Company's demands that did not consist of mandatory subjects of bargaining and it clearly was not illegal for the company to insist on these give-backs. The parties essentially stalled on these issues during the first three bargaining sessions which were held in January and February 1992. The Union thereupon commenced a strike on February 25.

With a strike imminent, the Company decided to hire a labor lawyer to represent it rather than its vice president, Lippolis, who for better or worse, was viewed by the Union as an amateur. When Frank was advised of the status of negotiations, he decided to continue making the company demands previously asserted and to make additional demands, some of which he hoped to trade away for union concessions. Part of Frank's strategy was not only to insist on a 1-year wage freeze, but to insist on not agreeing to any changes that the Union had made from the 1988 contract.

Given the change in the Company's representative, the strike and the concomitant testing of the economic resiliency of both parties, I cannot say that the Company's change in its bargaining posture evidenced its unwillingness to reach an agreement. In fact, the Company made specific contract proposals to the Union, discussed them at length, and made concessions as bargaining progressed. The Union, while within its rights, made absolutely no concessions of its own; Sturm testifying that it was not the Union's policy to negotiate against itself. Apparently what he means by this is that after the Company made a concession, the Union's policy was to stand pat and wait for more concessions. In effect, the Union's position from the first to the last day of negotiations was that the Company should sign the Union's proffered contract as presented and maybe the Union might, if the president approved, agree to lower the staffing level to 24. (Even as to that, the Union made no firm offer.)

Although one can say that the Company made regressive proposals which sought to modify the expired contract, and asked for even more give-backs after the strike commenced, I cannot say that the failure to reach an agreement was caused by the Company's actions. It is equally clear that the Union's representative entered these negotiations with, if not a closed mind, a mind that was not particularly open. The principal issues between the parties did not really change from the first to the last day. The Company wanted (1) a wage freeze, (2) the right to subcontract, (3) a reduction in force, (4) a reduction in the number of employees having free apartments, and (5) no retroactivity. Compared to these issues, the additional proposals placed on the bargaining table by Frank were far less substantial.

G. *Unfair Labor Practice Strike*

It is alleged that the strike which began on February 25 was an unfair labor practice strike as it was caused by the Employer's conduct on February 6, 1992. The Employer, while denying this contention, has notified the Union that it has only hired temporary replacements and will reinstate the strikers when and if they ask for the jobs back. (In effect, the Employer has decided to treat the strikers as if they were unfair labor practice strikers.)[12]

The testimony of the Union's witnesses was that they decided to strike and to announce the strike as being in protest of the February 6 unfair labor practice. It could be argued, however, that this was a pretext, seized upon to convert what would otherwise be an economic strike into an unfair labor practice strike with the concomitant effect of precluding the employer from hiring permanent replacements. On the other hand, if a strike is even partially caused or prolonged by a company's unfair labor practices, it will be defined as an unfair labor practice strike, notwithstanding that it is also motivated by economic considerations. *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270 (1956); *Teamsters Local 662 v. NLRB*, 302 F.2d 908 (D.C. Cir. 1962); *Workroom For Designers*, 274 NLRB 840, 856 (1985).

[11] On the other hand, in a situation where a company's proposals called for a union to waive its right to strike and negotiate grievances, while coupled with an almost unlimited management rights clause, the Board concluded that the company essentially offered a contract which would have been illusory because unenforceable. *Prentice-Hall, Inc*., 290 NLRB 646 (1988).

[12] Apart from a few strikers who abandoned the strike, the others, as of the time of the hearing, had not made offers to return to work. To date, all employees who have asked to return have been reinstated immediately.

In my opinion, the facts in this case are uncomfortably ambiguous. In view of the fact that except for a few employees, neither the strikers nor the Union on their behalf, have offered to return to work, and as the Company has committed itself to rehire these strikers when they make such an offer, I do not think that it is necessary to decide, in this proceeding, whether the strike is an economic or unfair labor practice strike.

CONCLUSIONS OF LAW

1. By soliciting employees to sign a petition to get rid of the Union, the Employer has violated Section 8(a)(1) of the Act.

2. By driving a vehicle in a reckless manner so as to threaten a striker with physical harm, the Employer has violated Section 8(a)(1) of the Act.

3. By refusing to furnish financial information to the Union after claiming inability to pay, the Employer has violated Section 8(a)(1) and (5) of the Act.

4. By failing to timely furnish the names and addresses of strike replacements, the Employer has violated Section 8(a)(1) and (5) of the Act.

5. By unilaterally ceasing to make payments to the Union's Pension and Annuity Funds on behalf of those bargaining unit employees who were employed as of the time that the strike commenced, and who either returned to work during the strike or never went on strike, the Employer has violated Section 8(a)(1) and (5) of the Act insofar as it has not made payments for such periods of time that these employees actually worked.

6. By unilaterally ceasing to make payments to the Union's Welfare Fund on behalf of those bargaining unit employees who abandoned the strike and returned to work during the strike, the Employer has violated Section 8(a)(1) and (5) of the Act insofar as it has not made such payments from the date of their return.

7. The Employer has not engaged in surface bargaining as alleged by the complaint.

8. The aforesaid violations affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Insofar as payments to the Pension, and Annuity Funds, I shall recommend that the Employer make these funds whole by making contributions to these funds, at the rates contained in the 1988–1991 contract, on behalf of those employees who either did not go out on strike or who abandoned the strike and returned to work. In this respect, no contributions would be owed on behalf of any employee for such period of time that he engaged in the strike.

I shall also recommend that the Employer make the Welfare Fund whole for such payments, at the 1988–1991 contract rate, on behalf of those employees who engaged in the strike but who returned to work during the strike. The obligation to resume such payments would begin on the date that each employee returned to work.[13] In this regard, the Employer argues that it should not be required to make the Welfare Fund whole for these employees because when they returned to work they were given an alternative health plan at the Employer's expense.

In *Manhattan Eye, Ear & Throat Hospital*, 300 NLRB 201 (1990), the Board overruled *Hassett Maintenance Corp*., 260 NLRB 1211 (1982), and held that an employer who unilaterally substituted medical insurance plans (and incurred the cost of a new plan), nevertheless was required to make whole the old welfare fund for those contributions that it unlawfully withheld. The Board stated:

> In the case of unilateral changes in negotiated benefits in connection with an unlawful withdrawal of recognition, the Act's purpose of protecting the collective-bargaining process is, in our view, best served by requiring respondents to restore the status quo ante through the mechanism of adherence to the terms of the agreements they have negotiated.
>
> Viewing the remedy recommended by the judge in purely monetary terms, we still reject the Respondent's arguments that ordering it to reimburse the funds requires it to ''make whole'' the funds and the employees where no losses have occurred. There can be no doubt that employees have, in addition to a stake in receiving benefits negotiated on their behalf by their chosen representatives, a clear economic stake in the viability of funds to which part of their compensation is remitted. [Citing *Stone Boat Yard v. NLRB*, 715 F.2d 441, 446 (9th Cir. 1983), and *Roman Iron Works* 292 NLRB 1292 fn. 15 (1989).]

The court of appeals in *Manhattan Eye, Ear & Throat Hospital v. NLRB*, 942 F.2d 151 (2d Cir. 1991), refused to enforce the Board's Order insofar as the remedy required the company to make the funds whole. Nevertheless, it seems to me that the reason the court refused to enforce that portion of the Order was that in the interim, the Union had disclaimed any interest in representing the affected employees and therefore had effectively abrogated the employer's obligation to bargain. The court stated:

> By refusing to enforce the Board's decision in this case we do not hold that in the exercise of its broad remedial power, it is not empowered to order imposition of the *status quo ante* in other cases where an employer unilaterally discontinues payments to union-sponsored benefit funds. . . . We simply rule that in the matter at hand, where the employees—who were compensated during the relevant period by substitute benefit plans and who prior to the Board's decision, disclaimed any present or future interest in being covered by the Joint Funds—have little economic stake in the future financial stability of those funds, imposition of the *status quo ante* does not serve the remedial purposes of the Act because it fails to benefit the employ-

[13] As noted above, the Company, in May 1992, resumed making payments to the Welfare Fund on behalf of those of its bargaining unit employees who never went on strike and made those payments retroactive to the commencement of the strike. Accordingly, no moneys would be owed by the Employer on their accounts.

ees, is unduly harsh on the employer, and results in a windfall for the union funds.

The Union in the present case has not disclaimed any interest in representing the employees. Nor has the employer been legally discharged from its obligation to bargain with the Union despite the fact that the parties are presently at an impasse. Therefore, it is my opinion that the instant case presents a different set of facts than those which convinced the Court in *Manhattan Eye, Ear & Throat Hospital* to withhold the Board's make-whole remedy.

Further, it is recommended that such payments to the various funds described above, be made with interest to be computed according to the practice set forth in *Merryweather Optical Co*., 240 NLRB 1213, 1216 fn. 7 (1979).

[Recommended Order omitted from publication.]